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IN THE

SUPREME COURT OF THE UNITED STATES

NO. 71-1012

October Term, 1971

WILLIAM S. NEIL, Warden,
Tennessee State Penitentiary,
Nashville, Tennessee,

Petitioner,

v.

CLARENCE PHILLIPS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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RESPONSE NOT PRINTED

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner William S. Neil, Warden, Tennessee State Penitentiary, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on December 7, 1971. A Motion to Rehear was denied January 7, 1972.

OPINIONS BELOW

Mr. Phillips' first degree murder conviction was affirmed by an unreported opinion of the Tennessee Court of Criminal Appeals, Eastern Division (Feb. 1970) (App. E), certiorari denied by the Tennessee Supreme Court (April, 1970) (App. F). The United States District Court for the Eastern District of Tennessee denied a petition for a writ of habeas corpus in an unreported order of September 9, 1970 (App. D). The Sixth Circuit reversed in an opinion not yet reported (App. C). A Motion to Rehear (App. B) was denied (App. A).

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on December 7, 1971. A motion to rehear was denied January 7, 1972. This petition for certiorari is timely filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

1. Was the Respondent denied due process when the trial judge permitted the prosecutor to read certain portions of his medical record in rebuttal to his insanity defense?[1]

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[1] At page two of its opinion, the Sixth Circuit stated this issue to be: "[T]he appellant [Mr. Phillips] argues that due process was denied him when the trial court did not sustain his objections to the prosecutor's reading of certain portions of his medical record in rebuttal to the insanity defense. These portions consisted of the reports of mental examinations made approximately one year prior to the alleged offense and contained, among other statements prejudicial to Phillips' case, the conclusion that the appellant had returned to Eastern State [hospital] to avoid certain criminal charges."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Habeas corpus is codified in Title 28, United States Code, which provides in pertinent part:

§2241. *Power to grant writ*

> "(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions . . .
>
> . . .
>
> "(c) The writ of habeas corpus shall not extend to a prisoner unless -
>
> "(3) He is in custody in violation of the Constitution or laws or treaties of the United States . . ."

STATEMENT OF THE CASE

The United States District Judge who considered the case summarized the facts as they refer to the due process argument as follows:

"Clarence Phillips is serving a sentence of fifty years and one day pursuant to a conviction for first degree murder and a judgment in the Criminal Court of Campbell County, Tennessee. Petitioner has exhausted available state remedies and seeks a writ of habeas corpus from this Court.

"A jury found petitioner guilty of murdering Arthur Queener, an elderly resident of Campbell County who lived alone. The evidence showed that Queener was beaten severely, that his home and outbuildings were set on fire, and that he died after being taken to LaFollette Community Hospital. Other evidence showed Phillips was in the vicinity when the crime occurred, that the homicide occurred during a robbery, that there were bloodstains on petitioner's clothes that matched the victim's, and that petitioner made various admissions that linked him with the crime. Phillips, represented by appointed counsel, attempted to show that he was insane at the time of the acts.

"On October 29, 1968, when Queener was beaten, Phillips was apparently on unauthorized leave from Eastern State Hospital, an institution that had been treating him periodically for mental disorders since 1965. Dr. Cortinas, a psychiatrist at Eastern State, treated petitioner upon his voluntary return about October 30, 1968. During the course of that treatment petitioner made admissions concerning his part in the homicide. He contends that these admissions were received in evidence in violation of the rules

announced in *Miranda v. Arizona*, 384 U.S. 436 (1966) and that the communications were also privileged. The Court holds that any question of privilege relates to Tennessee law, *Tenn. Code Annot.* 24-112, Communications between psychiatrist and patient, and the adverse decision of the Tennessee courts forecloses consideration of the issue. See also Advisory Committee's Notes to Proposed Rules of Evidence 5-04, Psychotherapist-Patient Privilege. 46 F.R.D. 161 (1969). The Court is of the opinion that no violation of the *Miranda* rules occurred.

"Doctor Cortinas had ordered that petitioner's complete file at the Hospital be organized to assist him in his mental evaluation. He testified that he had studied all the file while evaluating petitioner. Petitioner contends that the use of these records denied him the right to confront adverse witnesses, doctors who had made past reports but were not present to testify at trial. Petitioner's attorney did not object to the admission of these records. He even advised the Court that the records dated back to February, 1965. In rebuttal, the Attorney General read from portions of these records at which time petitioner's counsel objected to the use of other portions of the record. (There was a statement that petitioner had been admitted to the hospital for an evaluation after a burglary.) We are of the opinion that the trial court decided this issue properly."

REASON FOR GRANTING THE WRIT

The Sixth Circuit erred in deciding an important question of constitutional law as it relates to due process. It was not error on rebuttal for the prosecutor to read into the record portions of a file which were damaging to the defendant when the defendant had had the benefit of putting into evidence everything favorable in the file, and when the defendant through counsel had urged the admissibility of the file because it was "the official record of the institution."

The admissibility of the contents of the file on defendant kept by the officials at Eastern State Hospital was urged upon the court by Mr. Brown, trial counsel for the defendant, saying: "We submit, Your Honor, that it is proper; it is part of the official record of the institution."

The hospital official who introduced the medical file on defendant was a psychiatrist, Dr. Cortinas. When the record was tendered the following colloquy occurred:

"Q Do you have the record?

"A I do. At that time when the Court—

"Q Was this at another Court hearing, you are talking about?

"Mr. Brown: Yes. He was a witness in the preliminary hearing, and had a record at that time.

"The Witness: This is the original of this and this is the copy.

"Mr. Brown: Your Honor, there is no objection on our part to substituting the copy for the original, as far as this record is concerned.

"The Court: He has both the original and the copy. I will allow the filing of the copy, and allow you whatever time is necessary for you to compare it with the original.

"Mr. Brown: If he says it is a correct copy, that is all I want.

"Q Is this a correct copy, the same as that?

"A It is the same; it is a copy, yes. It is a correct copy.

"Mr. Brown: I will stipulate, Your Honor, that it is a correct copy.

"The Court: Well, now what does it consist of?

"The Witness: This is the whole record. This is the complete hospital record of the patient from the time of his first admission.

(Vol. 2, p. 70)

"Mr. Brown: It goes all the way back to February, 1965.

"The Witness: It is a long record.

"The Court: All right. This is filed as EXHIBIT 3. It is all together—I believe this is your subpoena, Doctor. You may want to keep that.

"(Exhibit 3, Eastern State Psychiatrist Hospital record, Re: Clarence Phillips, ESPH #37-589, identified and filed.)"

Defense counsel made no objection. He questioned Dr. Cortinas from the record, including a part of the record that was formally designated "HISTORY". Counsel for the defendant asked the doctor to read from the record about events which occurred beginning in 1965, to wit:

"He was admitted 2-17-65, escaped 3-1-65; returned 3-4-65, escaped 8-21-65; returned 9-2-65, eloped 1-6-66; discharged 3-26-66; readmitted 10-23-67, discharged 11-2-67; readmitted 5-21-68, eloped 7-7-68; returned 7-9-68, furlough 9-30-68; returned from furlough 10-29-68, discharged 11-22-68."

The appellant below relied on *Lyles v. United States*, 254 F.2d 725 (D.C. Cir. 1957). Defense counsel in that case as a matter of trial strategy offered in evidence an order of the court in an earlier proceeding adjudicating the defendant to be incompetent. On rebuttal, the Government offered a later order adjudicating the defendant to be competent. The Court of Appeals found "that the appellant could have insisted on the exclusion of the later order but having introduced evidence on the same subject in his own behalf in form of the earlier finding that he was not competent to stand trial and having acquiesced in the admission of the finding proscribed by the statute, he has deliberately waived his right to insist on the exclusion of the finding." *Id.*, at 732. One of the judges in his dissenting opinion pointed out that this decision put the District of Columbia "at odds with 'the vast majority of courts (which) readily admit not only routine observations by medical personnel in a hospital record but also diagnoses of a patient's physical and mental condition.'" *Id.*, at 736, quoting from 48 Col. L. Rev. 920, 929 (1948).[2]

The records were properly admitted on two counts. First, because of the business entry exception to the hearsay rule as well as the public documents exception, and, second, because once a portion of the records was introduced to establish facts favorable to the defendant, the State had the right to bring out other facts to the contrary contained in those records as a matter of rebuttal. The

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[2] The Sixth Circuit has held against the unlimited use of hospital records in **Baltimore and Ohio R.R. v. O'Neill**, 211 F.2d 190 (1954), and **Ranger, Inc. v. Equitable Life Assu. Soc.**, 196 F.2d 968 (1952). The weight of authority seem to be otherwise, particularly in the more recent cases. See **e.g., Thomas v. Hogan**, 308 F.2d 355 (4th Cir. 1962) (collecting cases on both sides); and **Rivers v. Union Carbide Corporation**, 426 F.2d 633 (3rd Cir. 1970) (a recent survey of the use of hospital records under the Federal Business Records Act).

Sixth Circuit held in *United States v. Littwin*, 338 F.2d 141, *certiorari denied* 380 U.S. 911 (1964) that where one party has put in part of a document the opposing party may put in the balance of the document to explain adverse inferences which might result from the incomplete character of the evidence.

CONCLUSION

The United States Court of Appeals for the Sixth Circuit erred when it held that Mr. Phillips was denied due process because of the introduction into evidence of hospital records which were used for impeachment purposes on rebuttal—records which he himself had sought to be admitted. A writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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APPENDIX A

[fol. 1] NO. 20,970

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FILED
Jan 7 1972
JAMES A. HIGGINS, Clerk

CLARENCE PHILLIPS,
Petitioner-Appellant,

v.

WILLIAM S. NEIL, Warden
Tennessee State Penitentiary,
Respondent-Appellee.

ORDER

Before: EDWARDS, PECK and MILLER, Circuit Judges.

We have carefully considered the Petition for Rehearing in this action filed on behalf of the respondent-appellee, and upon full consideration we find it to be without merit.

It is therefore ORDERED that the Petition for Rehearing be and the same is hereby denied.

ENTERED BY ORDER OF THE COURT.

/s/ James A. Higgins

Clerk

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

NO. 20970

FILED
Dec. , 1971
JAMES A. HIGGINS, Clerk

[fol. 1]

CLARENCE PHILLIPS,
Petitioner-Appellant,

v.

WILLIAM S. NEIL, Warden,
Tennessee State Penitentiary,
Respondent-Appellee.

MOTION TO REHEAR

The Appellee, William S. Neil, Warden, Tennessee State Prison, pursuant to Rule 40A of the Federal Rules of Appellate Procedure, prays that the Court grant a petition for rehearing in this cause. Subsequent to this Honorable Court's opinion in this case on December 7, 1971, Judge Weick, writing for a panel composed also of Chief Judge Phillips and Senior Circuit Judge Cecil, decided *Childs v. Cardwell, Warden*. This Court in
[fol. 2] that case held that procedural due process was afforded petitioner Childs even though the testimony of Detective Jansen was introduced against him as hearsay and even though it deprived Childs of his right of confrontation in violation of the Sixth Amendment.

The Warden would respectfully urge to the Court that the instant case is in conflict with *Childs v. Cardwell* and

we urge that this Court make a final disposition of the cause by affirming the judgment below.

Respectfully submitted,

.....

BART DURHAM
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[fol. 3] CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Rehear has been forwarded to David E. Smith, Esq., Attorney for Petitioner-Appellant, Clarence Phillips, 911 Hamilton Bank Building, Knoxville, Tennessee, on this the 20th day of December, 1971. I certify also that a copy of this Honorable Court's opinion in *Childs v. Cardwell* has been mailed this date to adversary counsel.

.....

BART DURHAM
Assistant Attorney General
State of Tennessee
Counsel for Respondent-Appellee

APPENDIX C

[fol. 1] NO. 20970

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

CLARENCE PHILLIPS,
Petitioner-Appellant,

v.

WILLIAM S. NEIL, Warden
Tennessee State Penitentiary,
Respondent-Appellee.

APPEAL from the United States District Court for the Eastern District of Tennessee, Northern Division

Decided and Filed December 7, 1971.

Before: Edwards, Peck, and Miller, Circuit Judges.

Miller, Circuit Judge. This is an appeal from the denial by the district court of appellant's petition for the writ of habeas corpus challenging his state court criminal conviction.

On February 18, 1969, Clarence Phillips was indicted by the Grand Jury of Campbell County, Tennessee, for the offense of first degree murder. He was charged with responsibility for the brutal slaying of Arthur Queener, which occurred on October 28, 1968. The jury returned a verdict of guilty and appellant was given a fifty year

sentence. Having a history of periodic hospitalization in Eastern State Mental Hospital dating from 1965 through the date of the alleged offense, he raised, among others, the insanity defense. At the close of the evidence, he moved for a directed verdict. The motion was denied. A motion for a new trial was filed and also denied. Appellant, thereafter, exhausted his state appellate remedies.

[fol. 2] The district court considered the points raised in the petition and ordered that the relief sought be denied. From this denial Phillips appeals.

The appeal is based on two contentions. First, the appellant argues that due process was denied him when the trial court did not sustain his objections to the prosecutor's reading of certain portions of his medical record in rebuttal to the insanity defense. These portions consisted of the reports of mental examinations made approximately one year prior to the alleged offense and contained, among other statements prejudicial to Phillips' case, the conclusion that the appellant had returned to Eastern State to avoid certain criminal charges. Second, he argues that that due process was denied him by the introduction of a confession made to the local sheriff absent a determination of voluntariness. He makes this contention even though a timely objection was not made and his subsequent motion to strike was granted and the jury instructed to disregard the testimony.

The district court held that appellant's second contention was without merit because of the absence of a timely objection and the granting of the motion to strike. The court further observed, in light of other substantial evidence, that the appellant committed the offense charged and that in any event the admission of the confession was harmless error. We agree with this conclusion. Thus

the question before us on appeal pertains to the appellant's defense of insanity.

The first witness to testify regarding the mental condition of the appellant was Dr. Manuel Cortinas, psychiatrist at Eastern State Hospital at the time of the events in question. Dr. Cortinas testified first as to the circumstances under which he first interviewed Phillips (he had heard rumors that a young patient was talking of having beaten an old man to death) and as to statements made by Phillips at this interview which amounted to a confession to the offense. During direct examination of Dr. Cortinas by the prosecution, a copy of appellant's medical record at Eastern State was filed in evidence as Exhibit [fol. 3] 3. The transcript of the trial reveals that the defense counsel acquiesced in the filing of a copy of the medical record rather than the original. No question at this point was raised regarding the admissibility of the record or any part of it under either Tennessee rules of evidence or federal constitutional standards. The colloquy which took place at this stage of the proceedings is set forth below.[1]

---

[1] The following colloquy took place at the time of the filing of the copy of the medical record:

Q. Do you have the record?

A. I do. At that time when the Court—

Q. Was this at another Court hearing, you are talking about?

MR. BROWN: Yes, he was a witness in the preliminary hearing, and had a record at that time.

THE WITNESS: This is the original of this; and this is the copy.

MR. BROWN: Your Honor, there is no objection on our part to substituting the copy for the original, as far as this record is concerned.

THE COURT: He has both the original and the copy. I will allow the filing of the copy, and allow you whatever time is necessary for you to compare it with the original.

MR. BROWN: If he says it is a correct copy, that is all I want.

Q. Is this a correct copy, the same as that?

(Continued on following page)

On cross-examination, counsel for appellant[2] questioned Dr. Cortinas extensively as to the appellant's mental state upon his return to Eastern State both generally [fol. 4] and at the time of the slaying. He testified that the appellant, then his patient, suffered from paranoid schizophrenia. When pressed on the question of whether the appellant was "mentally responsible" for his actions, the doctor stated:

> Well, to answer from a medical point of view—we are no judge—the patient, from a medical point of view, his judgment is impaired as to be responsible for his actions, I would say, and we consider him—I think anyone in psychiatry—that a psychotic patient—psychosis means deviation of judgment—and when a patient has a deviation of judgment, he doesn't know—I mean, really—I mean, his mind, in some way, we believe, from a medical point of view, that he is incompetent, from a medical point of view, and he is not able to make

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(Continued from preceding page)

A. It is the same; it is a copy, yes. It is a correct copy.
MR. BROWN: I will stipulate, Your Honor, that it is a correct copy.
THE COURT: Well, now what does it consist of?
THE WITNESS: This is the whole record. This is the complete hospital record of the patient from the time of his first admission.
MR. BROWN: It goes all the way back to February, 1965.
THE WITNESS: It is a long record.
THE COURT: All right. This is filed as EXHIBIT 3. It is all together—I believe this is your subpoena, Doctor. You may want to keep that.
(Exhibit 3, Eastern State Psychiatric Hospital record, Re: Clarence Phillips, ESPH #37-589, identified and filed.)

[2] Appellant was represented by court-appointed counsel and no question is raised as to his competence or as to the quality of his legal services in appellant's behalf.

decisions, he doesn't know what he is doing about any responsibility . . . .

From a medical standpoint, he is incompetent; from a medical point of view, mentally, from a medical point of view, he is incompetent. Any psychotic patient is incompetent.

He was asked:

Is it true, Doctor, that this man, this defendant Phillips, the patient, in your opinion is not considered responsible for his actions, and that is why you consider him incompetent?

Dr. Cortinas responded that this was true from a medical point of view. At no point in his testimony did Dr. Cortinas suggest in any way that the appellant had the capacity to distinguish right from wrong.

The second witness called upon to testify as to Mr. Phillips' mental state was Dr. Leyla Bozgoz, a medical doctor at Eastern State Hospital and a defense witness. Dr. Bozgoz was not a psychiatrist. When asked whether a schizophrenic with a psychotic condition would [fol. 5] be able to tell right from wrong, Dr. Bozgoz gave contradictory testimony.[3] More important was the doctor's response to another question:

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[3] The following took place on direct examination of Dr. Bozgoz by counsel for the appellant:

Q. Now this condition of schizophrenic reaction, with a psychotic condition, is a patient in that condition, in your opinion, responsible for his actions, medically, that is, does he know right from wrong? What is your opinion about this?

A. Yes, he should be. He ought to be able to tell right from wrong.

Q. If he is a schizophrenic with a psychotic condition he wouldn't be mentally responsible?

(Continued on following page)

Do you know the difference one way or the other whether the patient knew the difference between right and wrong when he escaped on September 30, 1968?

Dr. Bozgoz replied: "I have no idea, because he was not my patient."

The defense called five lay witnesses[4] who gave testimony pertaining to the appellant's mental condition: Tom Phillips, the grandfather of the appellant; Lucy Phillips, Tom Phillips' wife (the appellant often lived with the Phillips when he was not hospitalized); Louise Phillips, the appellant's aunt; Carl Harness, a neighbor who had worked with the appellant; and Dorothy Green, the appellant's mother. Each presented testimony which strongly suggested the appellant's mental incompetency, and each of the first three stated his or her opinion that the appellant was incapable of distinguishing right from wrong (Carl Harness and Dorothy Green were not questioned specifically regarding the appellant's ability to tell right from wrong).

[fol. 6]

At the conclusion of the appellant's proof, the state offered rebuttal which consisted solely of the reading of certain portions of the appellant's lengthy medical record

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(Continued from preceding page)

A. No, a psychotic would not be mentally responsible.
Q. If he was a psychotic, would he be calculated to know right from wrong?
A. No, sir.
Q. He would not?
A. No.

[4] It is the rule in Tennessee that lay testimony that the defendant is insane is competent so long as the witness states facts upon which he bases his opinion. **Davis v. State**, 161 Tenn. 23, 36 (1930). See also, **Wheeler v. Parr**, 3 Higgins 374.

compiled at Eastern State, a copy of which had been filed as Exhibit 3 earlier in the trial. The portions of the record read were reports of mental examinations made on October 31, November 1, and November 2, 1967, almost exactly one year prior to the events in question. The defense objected strenuously, stating:

> It was treated as—not having to have the original, my position is that that particular part that he wants to read would just not be competent here, two reasons, the first place, Your Honor, it's dealing with an altogether different time, second reason is, we have no opportunity to cross-examine the man who made that notation.

The court overruled these objections, feeling that since both parties had agreed to the filing of the entire record neither should be precluded from making use of any part of it.[5]

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[5] The following colloquy took place at this point in the proceedings:

ATTORNEY BROWN: We will object to this for two reasons, —

THE COURT: The Court may be mistaken, but I thought Exhibit 3 was introduced and filed as an Exhibit by agreement by both of you, that is The State and the Defendant.

ATTY. BROWN: It was treated as—not having to have the original, my position is that that particular part that he wants to read would just not be competent here, two reasons, the first place, Your Honor, its dealing with an altogether different time, second reason is, we have no opportunity to cross examine the man who made that notation.

THE COURT: Lets see what—

ATTY. BROWN: That is a statement in there by someone who is a total stranger to this thing.

ATTY. GENL. CARSON: Three pages there Your Honor. Since the Defense has gone back into all these matters in '65, seeking to rely upon this evidence here on behalf of the Defendant, we should be permitted now in rebuttal to show anything that would be inconsistent with what has been shown.

THE COURT: I will permit you to read from Exhibit 3, either one of

(Continued on following page)

[fol. 7] Statements made in the challenged reports were the only evidence before the jury which suggested that the appellant might be responsible for his action. Since the guilty verdict represented a rejection of the insanity defense, it seems apparent that the jury relied on these reports and therefore that their introduction was highly prejudicial to the appellant.

It should be pointed out that the reports make clear neither the identity of the author nor his or her name. Furthermore, while not barren of factual data, the basis of the opinions stated in the reports is far from clear. For example, after setting forth dates of previous hospitalizations, the second report stated:

> Despite these possible psycho-neurotic developments demonstrated throughout the interview, or in psychological tests data, the patient was felt to be competent. It was the staff's opinion that the patient must be considered sane and able to communicate with his Attorney. However he may be unwilling to do so. This information was forwarded to The Court and a diagnosis of no psychiatric disability was recommended.

Similarly, the first report stated the opinion that the appellant was capable of consulting with his attorney, and noted:

(Continued from preceding page)

you, any portion that you may wish. My understanding was it was filed with the agreement of both parties.

ATTY. BROWN: It would be treated as an exhibit only as to such portions as would be admissible testimony as to a Defendant in a criminal case.

THE COURT: I will permit any of you to read any portion of it you wish.

ATTY. BROWN: Note our exceptions.

> . . . throughout the interview he demonstrated a callous lack of concern for his illegal actions stating repeatedly that he hoped being here would knock the charge.

And finally, the third report concluded:

> No evidence for psychosis is found in test data in this examiners opinion. Personality development is faulty; sexual identification seriously distorted; lower intellect and probably inadequate thorazine, 100 [fol. 8] mg. TID, appeared to improve somewhat. Prognosis, guarded. Impairment, mild to moderate. Diagnosis, schizophrenic reaction, chronic undifferentiated type.

At the close of this rebuttal, the defense renewed its motion for a directed verdict and its objections to the prosecution's reading of the reports. These objections are set forth below.[6] The appellant's motion for a

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[6] Defense counsel stated:

> We would like very respectfully to save exception to The Courts ruling that this, particular portions of the transcript from the Eastern State Hospital could be read to the Jury, particularly for the reason that, reasons that, first place, statements in there that were made by parties who were not produced here as witnesses. And was not presented by any witness who could be cross-examined about it, undertake to go into other crimes that this man was accused in this particular Court of making, apparently an examination conducted to see whether or not in 1967, he was of sufficient capacity to be able to inform his Counsel, go to trial in some other case. And for all those reasons reading this into the record would be highly prejudicial to the Defendant. Further, when this record was filed as an Exhibit, never any intention, at least I had no understanding that by simply filing this thing so it would be available there for these doctors to refer to in their testimony and other parties who might have something in it, that it would be filed for the purpose of just reading any kind of report that might be in there from anybody was certainly beyond my conception, and I had no intention, frankly, of having ever asked it be filed for any such purpose as that. Just because its filed wouldn't mean that everything in it was competent. For those reasons we do very respectfully except to The Court's ruling in admitting that to the Jury.

(Continued on following page)

directed verdict was again denied; the court reiterated its view that since the medical records filed as Exhibit 3, had been admitted by agreement of the parties, the parties could properly make whatever use of them that they saw fit.

In *Davis v. State*, 161 Tenn. 23, 33, 34 (1930), the Tennessee Supreme Court reviewed the test for the insanity defense in Tennessee:

"The capacity to know right from wrong, and to know that the particular act being committed is
[fol. 9] wrong, is the rule recognized in this State for testing criminal accountability." *Johnson v. State*, *supra*.

This is a definite holding that an insane delusion does not excuse from crime in Tennessee unless accompanied likewise by perceptional insanity. Irresistible impulse influenced by an insane delusion is therefore a defense not known to our law as long as the faculty remains to distinguish between right and wrong.

The general rule is that if a defendant has capacity and reason to enable him to distinguish the difference between right and wrong as to the particular act he is then doing, he is criminally responsible for such act. Some of our later cases are *McElroy v. State*, 146 Tenn., 442; *Watson v. State*, 133 Tenn., 198, and *Bond v. State*, 129 Tenn., 75.

* * *

(Continued from preceding page)

We would also like at this point to renew the Motion which we made at the conclusion of the State's testimony for a directed verdict, based upon the same reasons, as stated in the original motion, based upon insufficient evidence upon which a conviction could be based.

The right and wrong test above mentioned was authoritatively laid down in *McNaughten's case*, 1 C. & K., 130, 8 Eng. Reprint, 718.

See also, *Temples v. State*, 183 Tenn. 531 (1946) and *Gibbs v. State*, 192 Tenn. 529 (1951).

Applying this rule, Tennessee courts have held that once the defense has made out a prima facie case of insanity in the terms of the M'Naughton Rule the State must in order to overcome the defense offer evidence in rebuttal which demonstrates beyond a reasonable doubt the sanity of the defendant. *Dove v. State*, 50 Tenn. 348, 3 Heisk 348 (1872); *Stuart v. State*, 60 Tenn. 178, 1 Baxt. 178 (1873); and *King v. State*, 20 S.W. 169, 91 Tenn. 617 (1892). See also, *Jordan v. State*, 135 S.W. 327, 124 Tenn. 81 (1910) and *U.S. v. Horne*, 304 F. Supp. 727 (1969).

In *Garner v. Louisiana*, 368 U.S. 157 (1961) the Supreme Court reversed criminal convictions for disturbing the peace when it found that

> . . . the convictions in these cases are so totally devoid of evidentiary support as to render them unconstitutional under the Due Process Clause of the Fourteenth Amendment. 368 U.S. at 163.

[fol. 10]

See also, *Thompson v. City of Louisville*, 362 U.S. 199, (1960). It is our view after a careful review of the record that no evidence was introduced tending to cast substantial doubt on the prima facie case that the appellant was insane at the time of the slaying. More certainly, there was no evidence introduced demonstrating the defendant's sanity beyond a reasonable doubt. We choose not to rely on this ground, however, since we hold that the admission of the

three challenged reports constituted a violation of appellant's Sixth Amendment right to confrontation and cross-examination.

In *Pointer v. Texas*, 380 U.S. 400 (1964), the Supreme Court held that "the Sixth Amendment right of an accused to confront the witnesses against him is . . . a *fundamental right* and is made obligatory on the State by the Fourteenth Amendment." Emphasizing the importance of cross-examination in the fair adjudication of criminal matters the Court stated:

> It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witness against him. And probably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case. 380 U.S. at 404.

The Court has made clear the importance of this right in our scheme of criminal justice on a number of occasions. For example, in *Green v. McElroy*, 360 U.S. 474 (1964), the Supreme Court said of rights of confrontation and cross-examination:

> They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right 'to be confronted with the witnesses against him.' This Court has been zealous to protect these rights from erosion. 360 U.S. at 496-497.

[fol. 11] And Again in *Pointer*, it was said:

> There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, we have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law. 380 U.S. at 405.

Especially pertinent is *Smith v. Illinois*, 340 U.S. 129 (1967), where the accused's Sixth Amendment rights were held to have been abridged when the trial court sustained the prosecutor's objections to disclosure on cross-examination of the correct name and address of the key witness for the prosecution. The Court stated:

> In the present case there was not, to be sure, a complete denial of all right of cross-examination. But the petitioner was denied the right to ask the principal prosecution witness either his name or where he lived, although the witness admitted that the name he had first given was false. Yet when the credibility of a witness is in issue, the very starting point in "exposing falsehood and bringing out the truth" through cross-examination must necessarily be to ask the witness who he is and where he lives. The witness' name and address open countless avenues of in-court examination and out-of-court investigation. To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself. 390 U.S. at 131 (footnote omitted).

The appellee asserts that the challenged evidence was properly admitted under the statutory exception to the

hearsay rule embodied in section 24-714 of the Tennessee Code:

[fol. 12] *Records as evidence*. —A record of an act, condition, or event, shall, insofar as relevant, be competent evidence if the custodian or other qualified witness, testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission. [Acts 1957, ch. 154, § 2.]

The admissibility of the challenged records under the statute was not adjudicated as the state courts focused upon the agreement of defense counsel to the filing of a copy of the entire hospital record in evidence and not upon the substantive requirements of the statute. It is likely that Tennessee courts would find that hospital records fall within the general application of the statute. The great weight of judicial and scholarly authority supports such a holding.[7] Nevertheless, that proffered evidence is a business or hospital record does not alone dispose of the question of admissibility in a specific case.

In *Neas v. Snapp*, 221 Tenn. 325 (1968) the Tennessee Supreme Court held that evidence was improperly admitted under the above provision where a proper foundation was not laid for the introduction of an autopsy report into evidence. In so holding the Tennessee Court stated:

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[7] The admission of hospital records is discussed in some detail in McCormick, Charles T., **Law of Evidence** § 290, pp. 609-613. Also instructive is a comprehensive annotation found in 9 A.L.R. Fed. 457.

Obviously, Mrs. Snapp was not the custodian of the report; nor could she qualify as an "other qualified witness" under the terms and provisions of the statute.

Moreover, there is no evidence from which the trial judge could determine whether, "the sources of information, method and time of preparation" justified the admission of the report.

Accordingly, a proper foundation for the introduction of the autopsy report does not appear in the record.

[fol. 13] Every report or other writing is not admissible simply because it was made or rendered in the conduct of some business or profession. A compliance with all the qualifications of the statute is a prerequisite to admissibility. 221 Tenn. at 330.

It is in the requirements for laying of a foundation that the principles underpinning the exception will find expression.[8]

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[8] The principles underlying what Professor Wigmore would term legitimate exceptions to the hearsay rule are discussed extensively in 5 **Wigmore on Evidence**, Sections 1421, 2, and 3, pp. 202-4. Professor Wigmore stated, discussing the two principles which he found to underpin legitimate exceptions to the hearsay rule—circumstantial probability of trustworthiness and a necessity:

> Principle of the Exceptions to the Hearsay Rule. The purpose and reason of the Hearsay rule is the key to the Exceptions to it.
>
> The theory of the Hearsay rule (**ante** § 1362) is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination. But this test or security may in a given instance be superfluous; it may be sufficiently clear, in that instance, that the statement offered is free enough from the risk of inaccuracy and untrustworthiness, so that the test of cross-examination would be a work of supererogation. Moreover, the test may be impossible of employment—for example, by reason of the death of the declarant—so that, if his testimony is to be used at all, there is a necessity for taking it in the untested shape.
>
> • • •

(Continued on following page)

Thus, in the instant criminal case, where the appellant was sentenced to fifty years, the hearsay evidence which may have been outcome-determinative was admitted with no judicial scrutiny of necessity or special reliability (under *either* state evidentiary or federal constitutional standards).

The relationship between the Sixth Amendment right to confrontation and cross-examination and the hearsay rule and its exceptions has not been fully explored. Some time ago Professor Wigmore asserted an identity [fol. 14] between the two, stating, seemingly without qualification:

> The rule sanctioned by the constitution is the Hearsay rule as to cross-examination, with all the exceptions that may be legitimately found, developed, or created therein. 5 *Wigmore on Evidence*, section 1397, p. 131.

In two recent cases, *Dutton v. Evans*, 400 U.S. 74 (1970) and *California v. Green*, 399 U.S. 149 (1969), the Supreme Court, while refusing to set forth a theory "that would determine the validity of all such hearsay 'exceptions' " (399 U.S. at 162), provided guidance regarding proper application of the Confrontation Clause. In both cases the Court expressly rejected the notion of congruency. In *Dutton v. Evans*, *supra*, Mr. Justice Stewart stated:

(Continued from preceding page)

> A perception of these two principles and their combined value has been responsible for most of the Hearsay exceptions. Each exception, to be sure, has come into existence and been maintained independently and amid considerations peculiar to itself alone. There has been no comprehensive carrying-out of a system of principles. Yet the results may be coordinated under those two heads. There has rarely been any judicial summing-up of the principles; yet their existence has been fully perceived and often judicially stated.

> It seems apparent that the Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots. But this Court has never equated the two, and we decline to do so now. 400 U.S. at 86.

And in *California v. Green*, *supra*, Mr. Justice White stated:

> While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception. See *Barber v. Page*, 390 U.S. 719 (1968); *Pointer v. Texas*, 380 U.S. 400 (1965). The converse is equally true: merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied. 399 U.S. 155, 6.

[fol. 15] Thus, it is abundantly clear that proper admission of evidence under an exception to the hearsay rule does not relieve a federal court considering a state criminal conviction from the responsibility for reviewing all the facts of the case in light of governing federal constitutional principles. Furthermore, fundamental constitutional rights may find protection both in procedural safeguards and in substantive rules. Standards of due process are not necessarily embodied in state evidentiary rules. For example, as we shall see below, while the

colloquy which took place when the medical records were filed as Exhibit 3 might arguably have constituted a waiver of a hearsay objection under Tennessee law, it in no way constitutes a valid waiver of a "fundamental right" guaranteed in both state and federal criminal prosecutions. Thus, that the reports may have been validly admitted under Tennessee rules of evidence does not dispose of the question whether their admission constituted a violation of the appellant's Sixth Amendment rights.

It is well to review briefly the rulings in *Dutton v. Evans*, *supra*, and *California v. Green*, *supra*, as they make plain the view of a majority of the Court concerning the proper role and application of the right to confrontation and cross-examination. In the *Evans* case, the Court reversed the Fifth Circuit's holding that a Georgia statutory co-conspiracy exception to the hearsay rule violated the Sixth Amendment. The challenged evidence involved the testimony of a witness Shaw who stated that an alleged co-conspirator Williams had said to him upon Williams' return to the penitentiary:

> If it hadn't been for that dirty son-of-a-bitch Alex Evans, we wouldn't be in this now. 400 U.S. at 77.

Holding that no abridgment of the Sixth Amendment guarantee had occurred, the Court pointed to what it termed "indicia of reliability," stating:

> The confrontation issue arises because the jury was being invited to infer that Williams had im-
> [fol. 16] plicitly identified Evans as the perpetrator of the murder when he blamed Evans for his predicament. But we conclude that there was no denial of the right of confrontation as to this question of identity. First, the statement contained no express asser-

tion about past fact, and consequently it carried on its face a warning to the jury against giving the statement undue weight. Second, Williams' personal knowledge of the identity and role of the other participants in the triple murder is abundantly established by Truett's testimony and by Williams' prior conviction. It is inconceivable that cross-examination could have shown that Williams was not in a position to know whether or not Evans was involved in the murder. Third, the possibility that Williams' statement was founded on faulty recollection is remote in the extreme. Fourth, the circumstances under which Williams made the statement were such as to give reason to suppose that Williams did not misrepresent Evans' involvement in the crime. These circumstances go beyond a showing that Williams had no apparent reason to lie to Shaw. His statement was spontaneous, and it was against his penal interest to make it. These are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant.

The decisions of this Court make it clear that the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that "the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement." California v. Green, 399 U.S., at 161. Evans exercised, and exercised effectively, his right to confrontation on the factual question whether Shaw had actually heard Williams make the statement Shaw related. And the possibility that cross-examination of Williams could conceivably have shown the jury that the statement, though

made, might have been unreliable was wholly unreal. 400 U.S. at 88, 89 (emphasis added).

[fol. 17] In *California v. Green*, *supra*, the Supreme Court reversed the California Supreme Court's holding that "prior statements of a witness that were not subject to cross-examination when originally made, could not be introduced . . . to prove the charges against a defendant without violating the defendant's right of confrontation guaranteed by the Sixth Amendment." The Court relied primarily on the availability of the declarant for cross-examination at the trial itself. Disclaiming any intention of elaborating a theory of the Confrontation Clause, Mr. Justice White stated:

> We have no occasion in the present case to map out a theory of the Confrontation Clause that would determine the validity of all such hearsay "exceptions" permitting the introduction of an absent declarant's statements. For where the declarant is not absent, but is present to testify and to submit to cross-examination, our cases, if anything, support the conclusion that the admission of his out-of-court statements does not create a confrontation problem. 399 U.S. at 162.

Significantly, the Court characterized, by way of contrast with the facts before it, the type of case in which the right to confrontation is most likely to be found to have been abridged:

> Finally, we note that none of our decisions interpreting the Confrontation Clause requires excluding the out-of-court statements of a witness who is available and testifying at trial. The concern of most of our cases has been focused on precisely the opposite situation—situations where statements have been admitted in the

absence of the declarant and without any chance to cross-examine him at trial. These situations have arisen through application of a number of traditional "exceptions" to the hearsay rule, which permit the introduction of evidence despite the absence of the declarant usually on the theory that the evidence possesses other indicia of "reliability" and is incapable of being admitted, despite good-faith efforts of the State, in any way that will secure confrontation with the

[fol. 18] declarant. Such exceptions, dispensing altogether with the literal right to "confrontation" and cross-examination, have been subjected on several occasions to careful scrutiny by this Court. 399 U.S. 161, 2.

Similarly, it is well to recall the statement of the Supreme Court made nearly three-quarters of a century before when the Court articulated the nature of its concern in such matters. The Court stated:

> The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief. *Mattox v. United States*, 156 U.S. 237, 242-243 (1895).

In the instant case, as pointed out, the challenged reports appear to have been outcome-determinative. At

no point did the appellant have the opportunity to confront their author. We consider this to be precisely the sort of case which deserved the "careful scrutiny" spoken of in *Green*. It is plain that we have before us a classic illustration of the efficacy of the Sixth Amendment guarantee of the right to confrontation and cross-examination.

It should be pointed out that the record contains no suggestion as to why the state chose to rely on hearsay evidence as rebuttal, instead of calling the authors of the reports to testify. The Supreme Court has made plain that death or other unavailability of important witnesses may justify exception to the right to cross-examination in certain circumstances. And, indeed, there may be other reasons why it might be desirable to deny a defendant the right to cross-examination. Absent a suggestion to the contrary, we may surmise that the chief value of the introduction of the reports in this case lay squarely in the fact that cross-examination was made impossible.

[fol. 19]

Neither the identity nor the qualifications of the authors of the reports was available to the jury. The importance of such factors is illustrated by the holding in *Smith v. Illinois*, *supra*, where denial of cross-examination as to the real name and address of the key prosecution witness constituted a Sixth Amendment violation.

Further, the most damaging portions of the reports consist of opinions and conclusions which are stated without a detailed explication of either the facts or reasoning processes on which they are based. The danger which inheres in the introduction of records containing psychiatric diagnoses has been pointed out in at least two rulings which dealt not with the right to confrontation, but with the admissibility of such evidence under business records acts

somewhat like the Tennessee statute. In *New York Life Ins. Co. v. Taylor*, 147 F.2d 297, 304, 305 (D.C. Cir., 1945) the court stated:

> It is no reflection upon the profession of psychiatry to say that it necessarily deals in a field of conjecture. Even in the diagnosis of actual insanity, cases are rare in which trained psychiatric witnesses do not come to opposite conclusions. The opinions here relate to neurosis, a condition short of insanity, on which there are countless theories and infinite diagnostic possibilities. It is difficult to conceive of records in which the right of cross-examination is more important than the conjectures of a psychiatrist on a psychoneurotic condition.
>
> The drastic impairment of the right of cross-examination resulting from the admission of this type of unsworn observation and opinion evidence will be recognized by anyone familiar with the psychology of a jury trial. The unsworn psychiatric diagnosis would be introduced, with appropriate fanfare as to the distinguished character of the alienist who made it, but who is not called as a witness. The opposing party might have plenty of data to shake this testimony on cross-examination, yet he would have to remain silent while a strong prima facie case is made against him. The risk of perjury would be neatly avoided because the real witness is not sworn.
>
> It is true that after the party who introduced such opinions has closed his case the opposing party would have a chance to rebut them. But the disadvantageous position in which the denial of his right of cross-examination would place him is obvious to any trial lawyer. A period of time has gone by; an impression on the

[fol. 20]

jury has been made. The expensive and sometimes impossible burden of hunting out and producing the psychiatrist who gave the opinion is unjustly shifted to the party against whom the opinion is used. And after he catches and produces the psychiatrist he must offer him as his own witness—a disadvantage only slightly limited by the fact that the trial court may in its discretion allow him to impeach his own witness. Only a lawyer without trial experience would suggest that the limited right to impeach one's own witness is the equivalent of that right to immediate cross-examination which has always been regarded as the greatest safeguard of American trial procedure. 147 F.2d at 304 and 305. See also, *Lyles v. United States*, 254 F.2d 725 (D.C. Cir. 1957).

That the reports were made approximately one year prior to the alleged offense further underscores the potential prejudice which inhered in their evidentiary use without cross-examination. While historical information is not irrelevant to a determination as to the mental state of an accused at the time of an alleged offense, there is the danger that not seen in the proper perspective, a jury will distort its worth. In the instant case, for example, the jury obviously relied on the conclusions of the challenged reports rather than those of Dr. Cortinas in reaching its verdict. These were conclusions which the authors of the report might well have rejected or modified in light of the facts which Dr. Cortinas ascertained immediately after the crime.

[fol. 21]

Thus, in the instant case, where no showing was made of special need to dispense with the appellant's right of confrontation, we find not the "indicia of reliability" discovered in *Evans*, but rather factors which indicate a

distortion of the "truth-determining process." In *Evans v. Dutton*, *supra*, the Supreme Court made clear that the mission of the Confrontation Clause is the protection of the integrity of this process. We hold, therefore, that the introduction into evidence of the reports in question constituted a denial of the appellant Phillips' right to confrontation and cross-examination guaranteed by the Sixth Amendment.

We turn now to the question of waiver. While not speaking specifically in terms of waiver of constitutional rights, the appellee, the court below, and the state courts make the agreement of trial counsel to the filing of the medical records as Exhibit 3 the focus of their analysis of this case. We find that trial counsel's acquiescence did not constitute a valid waiver of the appellant's fundamental constitutional right to confrontation with regard to the crucial evidence here in question.

In *Brookhart v. Janis*, 384 U.S. 1 (1965), a case which also involved the Sixth Amendment right to confrontation, the Supreme Court made clear the nature of the standard and the process of review appropriate in examination of asserted waiver of such constitutional rights. The Court stated:

> The question of a waiver of a federally guaranteed constitutional right is, of course, a federal question controlled by federal law. There is a presumption against the waiver of constitutional rights, see, *e.g.*, *Glasser v. United States*, 315 U.S. 60, 70-71, and for a waiver to be effective it must be clearly established that there was "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464.

[fol. 22] In deciding the federal question of waiver raised here we must, of course, look to the facts which allegedly support the waiver, 384 U.S. at 4.

Emphasizing the importance of the question involved, the Court said:

> In this Court respondent admits that:
>
> "[I]f there was here a denial of cross-examination without waiver, it would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it."
>
> This concession is properly made. 384 U.S. at 3.

Johnson v. Zerbst, 304 U.S. 458 (1938) and subsequent cases relying on it [see e.g. *Glasser v. United States*, 315 U.S. 60, 70-71 (1941); *Brookhart v. Janis*, *supra*; and *Boykin v. Alabama*, 395 U.S. 238 (1969)]; have made plain the duty of a trial court to ascertain beyond doubt that waiver of a fundamental constitutional right is "intentional" and "intelligent." For waiver to be valid, it must be plain from the record that the accused understands the nature of the right waived and knowingly assents to its waiver.

The appellant Phillips did not so waive his Sixth Amendment right to confrontation. The challenged evidence was filed in evidence as part of an extensive medical record. The colloquy which took place at that point in the proceedings reveals no hint that appellant's counsel, much less the appellant himself, had any intention of waiving the right to cross-examination as to any evidence containing opinions and conclusions regarding the pivotal question of

his mental condition.[9] Furthermore, the strenuous and repeated objections of trial counsel upon his realization of what portions of the medical record the prosecution intended to read indicate that he had not "intelli-
[fol. 23] gently" intended to waive the right of cross-examination or other legitimate objections to such evidence.[10]

Even assuming that the medical record was allowed merely to be filed by defense counsel through some trial strategem which went awry, we could hardly hold that such constituted a valid waiver of appellant's Sixth Amendment right of confrontation.

Accordingly, the decision of the district court is reversed and remanded with direction for entry of judgment granting the writ discharging the appellant from custody unless he is retried within a reasonable time.

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[9] See footnote 1.

[10] See footnotes 5 and 6.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE NORTHERN DIVISION

[fol. 1]

The original hereof was filed or entered and docketed SEP. 9, 1970.

CLARENCE PHILLIPS

v.

WILLIAM S. NEIL, Warden

Civil Action No. 7024

Clarence Phillips is serving a sentence of fifty years and one day pursuant to a conviction for first degree murder and a judgment in the Criminal Court of Campbell County, Tennessee. Petitioner has exhausted available state remedies and seeks a writ of habeas corpus from this Court.

A jury found petitioner guilty of murdering Arthur Queener, an elderly resident of Campbell County who lived alone. The evidence showed that Queener was beaten severely, that his home and outbuildings were set on fire, and that he died after being taken to LaFollette Community Hospital. Other evidence showed Phillips was in the vicinity when the crime occurred,

[fol. 2]

that the homicide occurred during a robbery, that there were bloodstains on petitioner's clothes that matched the victim's, and that petitioner made various admissions that linked him with the crime. Phillips, represented by appointed counsel, attempted to show that he was insane at the time of the acts.

On October 29, 1968, when Queener was beaten, Phillips was apparently on unauthorized leave from Eastern State Hospital, an institution that had been treating him periodically for mental disorders since 1965. Dr. Cortinas, a psychiatrist at Eastern State, treated petitioner upon his voluntary return about October 30, 1968. During the course of that treatment petitioner made admissions concerning his part in the homicide. He contends that these admissions were received in evidence in violation of the rules announced in *Miranda v. Arizona*, 384 U.S. 436 (1966) and that the communications were also privileged. The Court holds that any question of privilege relates to Tennessee law, *Tenn. Code Annot.* 24-112, Communications between psychiatrist and patient, and the adverse decision of the Tennessee courts forecloses consideration of the issue. See also Advisory Committee's Notes to Proposed Rules of Evidence 5-04, Psychotherapist-Patient Privilege. 46 F.R.D. 161 (1969). The Court is of the opinion that no violation of the *Miranda* rules occurred.

Doctor Cortinas had ordered that petitioner's complete file at the Hospital be organized to assist him in his mental evaluation. He testified that he had studied all [fol. 3] the file while evaluating petitioner. Petitioner contends that the use of these records denied him the right to confront adverse witnesses, doctors who had made past reports but were not present to testify at trial. Petitioner's attorney did not object to the admission of these records. He even advised the Court that the records dated back to February, 1965. In rebuttal, the Attorney General read from portions of these records at which time petitioner's counsel objected to the use of other portions of the record. (There was a statement that petitioner had been admitted to the hospital for an evaluation after a burglary.) We are of the opinion that the trial court decided this issue properly.

Hospital officials delivered petitioner into the custody of the Campbell County Sheriff in Knoxville. The Sheriff testified that Phillips made certain admissions during the trip from the Hospital to the jail. This testimony was initially received without objection. Upon counsel's subsequent motion to strike, the jury was excused, and the Court heard testimony on the admissibility of the evidence. The trial court ruled the statements inadmissible, struck the testimony, and instructed the jury to disregard the statements before the Sheriff resumed his testimony at a later point in the trial. Failure to make timely objection resulted in the initial admission of this evidence. Petitioner cannot now complain of any prejudice that may have resulted from this failure. Also, in view of
[fol. 4] the fact that petitioner's defense rested upon his sanity, any error is at most harmless.

Petitioner also complains of the introduction into evidence of Exhibit 13, a newspaper article purportedly containing statements by the Sheriff about petitioner's admissions. The trial judge instructed the jury that they were not to consider the truth of any statement contained in the article. They could only consider the fact that Phillips personally possessed the clipping. In view of the insanity defense, any error, and the Court finds none, was harmless.

It is, therefore, ORDERED that the petition for habeas corpus be, and same hereby is, denied.

Enter:

ROBT. L. TAYLOR
United States District Judge

APPENDIX E

IN THE
COURT OF CRIMINAL APPEALS OF TENNESSEE
KNOXVILLE

DECEMBER 1969

APPEAL IN ERROR FROM THE CRIMINAL COURT OF
CAMPBELL COUNTY
HONORABLE D. L. HUTSON, JUDGE

FILED
Feb. 19, 1970
9:30 o'clock A. M.
John A. Parker, Clerk

CLARENCE PHILLIPS,
Plaintiff in Error

v.

STATE OF TENNESSEE,
Defendant in Error

NO. 8

For the Plaintiff in Error:

Harry B. Brown
Jellico, Tennessee

For the Defendant in Error:

David M. Pack
Attorney General
Nashville, Tennessee

Thomas E. Fox
Deputy Attorney General
Nashville, Tennessee

Arzo Carson
District Attorney General
Huntsville, Tennessee

JUDGMENT AFFIRMED
OPINION BY JUDGE ORIS D. HYDER
FILED: .....

Appendix E - Opinion

[fol. 1]

OPINION

This is an appeal in the nature of a writ of error of a conviction of murder in the first degree with sentence fixed at fifty years and one day in the penitentiary. The defendant is indigent and represented by appointed counsel.

Clarence Phillips, the plaintiff in error and the defendant below, was indicted by the Grand Jury of Campbell County for the murder of Arthur Queener, an elderly man who lived alone in a rural section of the county. On October 28, 1968, at approximately six o'clock in the evening, neighbors discovered that Mr. Queener's home was on fire, and by the time they could get there it was destroyed. They found a smoke house also burning, and Mr. Queener was crawling around on the ground trying to get into the burning shed. He was severely beaten and cut around the head and chest and was taken to the hospital in an ambulance. His attending physician testified concerning his condition and death two days later. He said that he died from a hemorrhage around the brain, or a concussive type injury due to the fracture of his skull. An autopsy was performed. He stated that Mr. Queener was unconscious and in shock when he first saw him.

The defendant, who was eighteen years of age at the time of this homicide, was first committed to Eastern State Hospital for mental illness in 1965. Between 1965 and 1968 he was in and out of that hospital several times. On some occasions he would be released and on others he would "elope" or escape without permission. He left the hospital on September 30, 1968, without permission, and he returned to the hospital voluntarily on

[fol. 2] October 29, 1968. During the periods when he was not in the hospital he usually stayed with his mother and step-father; or he stayed with his grand-

father; but none of them knew where he stayed on the night of October 28, 1968, and they were not aware that he had returned to the hospital on the next day. On November 22, 1968, the Sheriff of Campbell County removed the defendant from the hospital to the county jail. About a week after he was placed in the jail he confessed to a jail mate that he had killed Arthur Queener. Freddy Hicks testified that he was a trusty in the jail during the last of November and the first of December, 1968, and that he had known the defendant previously. A part of his testimony follows:

"Q. Alright, what did he tell you about Mr. Queener, just how did it come about?

"A. Well you know we was just a talking, he told me that he got $200.00 off that man and hid it, then he said he was just kidding me, said he just got about $24 or $25.

"Q. Did you say anything back to him then?

"A. No, you know we just kept talking.

"Q. Alright then what did he say?

"A. Said that he went out there, didn't go out there to kill the man, said he just went out there to rob him, and said the man drawed a knife on him and then he said he started beating him up with a wrench, I reckon, and said when he started beating him that he couldn't quit, said he started to tie him up with a rope and then he broke the lamp and set the house on fire."

There was an abundance of testimony and evidence which corroborated the defendant's confession to the inmate in the jail. The medical record of the defendant

indicates that he was a dangerous and violent person. He has stated to several people that he was going to kill somebody. On the night of the crime, approximately
[fol. 3] one hour previous to its discovery, he caught a ride with a magistrate to where the country road leading down to Mr. Queener's house intersects with the highway. The place where he asked to get out was nine tenths of a mile from Mr. Queener's home. When he was admitted to the hospital on October 29th there was blood on some of his clothing, and this was shown to be of the same type as that of Mr. Queener. He knew the victim, and he had been at his house, and he knew that he lived alone. Also, the defendant confessed to the crime to Dr. Cortinas, a psychiatrist at Eastern State Hospital.

The defendant did not testify in his own behalf.

The first three assignments of error are directed to the evidence, or facts, and they are discussed together in the defendant's brief. The third assignment contends that there is no evidence establishing that cool, deliberate premeditation which is required to constitute murder in the first degree. Further, it is contended that there is no evidence from which premeditation can be implied.

It is asserted, on behalf of the defendant, that his mental condition, his going through depressions and then into periods of remission, render him incapable of that premeditated killing which must be proven before there can be a conviction of murder in the first degree.

We feel that this argument overlooks the legal effect of the verdict of the jury and the law governing appellate review. Our Supreme Court, in *Carroll v. State*, 212 Tenn. 464, 370 S.W.2d 523, said:

"The jury and the Trial Judge saw the witnesses face to face, heard them testify, and observed their demeanor on the stand, and were in much better position than we are, to determine the weight to be given their
[fol. 4] testimony. The 'human atmosphere of the trial and the totality of the evidence' before the court below cannot be reproduced in an appellate court, which sees only the written record."

A verdict of guilty, approved by the trial judge, accredits the testimony of the State's witnesses, resolves all conflicts in the testimony in favor of the State and establishes the State's theory of the case. Under such a verdict the presumption of innocence disappears, and upon appeal, that presumption of innocence is replaced by a presumption of guilt. This Court is not permitted to reverse a convictior upon the facts unless the evidence clearly preponderates against the verdict and in favor of the innocence of the accused. We may review the evidence only to determine whether it preponderates against the verdict, and the defendant on appeal has the burden of showing that the evidence preponderates against the verdict and in favor of his innocence. *McBee v. State*, 213 Tenn. 15, 372 S.W.2d 173; *Bacon v. State*, 215 Tenn. 268, 385 S.W.2d 107; *Gulley v. State*, 219 Tenn. 114, 407 S.W.2d 186; *Brown v. State*, Tenn. Crim. App., 441 S.W.2d 485.

We have reviewed the evidence carefully in our consideration of the sufficiency and weight of the proof to sustain the verdict of the jury finding the defendant guilty of murder in the first degree. The indictment charges that the defendant did "feloniously, willfully, maliciously, deliberately, and premeditatedly and with malice aforethought, with hands, sticks, stones, and clubs strike,

beat and kill one Arthur Queener and did then and there commit murder in the first degree."

In an 1849 decision in a case of murder in the first degree where the defendant, intending to kill one person, shot and killed another, the Supreme Court of [fol. 5] this State discusses the conclusive legal presumption of malice and guilty intention when the killing occurs while in the perpetration of one of the felonies named in the statute. There the Court said:

"In cases of murder by means of poison, or lying in wait, the most atrocious and detestable of all kinds of homicide, and the least to be guarded against, either by resistance or forethought, the crime is made to depend exclusively upon the 'means' causing death. So, likewise, in respect to cases of murder committed in the perpetration of, or attempt to perpetrate arson, rape, robbery, burglary or larceny; a class of felonies most dangerous in their consequences to public safety and happiness, which may be most frequently and easily committed, and to which there are the strongest temptations. In all these cases, the mode or 'means' of destroying life, supplies a conclusive legal presumption of malice and guilty intention; the crime, as well as the legal guilt of the agent, is made to depend alone upon the fact of taking life in either of the specified modes. In such cases, the question of malice or intention, as a matter of fact, is wholly irrelevant; it need not be proved, and cannot be controverted by the accused. But the remaining species of murder defined in the statute, namely, murder 'by any other kind of wilful, deliberate, malicious and premeditated killing,' falls within the operation of a directly contrary principle." *Bratton v. State*, 29 Tenn. 103.

The fact that the State did not charge the defendant with the commission of a murder while in the perpetration of a robbery does not preclude the jury from such a finding and thus establish that the offense was murder in the first degree. In *Sullivan v. State*, 173 Tenn. 475, 121 S.W.2d 535, the defendant killed the deceased while attempting to commit murder in the first degree on another person. The indictment did not charge that the defendant committed murder in the first degree in the perpetration of, or attempt to perpetrate murder in the first degree, but simply charged that he did unlawfully, feloniously, willfully, maliciously, deliberately, premeditatedly and of his malice aforethought assault one Hattie Sullivan and did so commit murder in the first degree. It was asserted for the defendant that it was error to allow the conviction to stand since the indictment did not allege that the killing was committed while the defendant was attempting to commit murder in the first degree upon the body of another person than Hattie Sullivan. In rejecting this assertion, our Supreme Court said:

[fol. 6]

"The great weight of authority is to the contrary. In 30 C.J., 98, it is said:

"'In Perpetration of Another Offense. Where the homicide is committed in the perpetration of or attempt to perpetrate a felony, it is ordinarily held that an indictment in the ordinary form for murder or for murder in the first degree is sufficient without averment of the connected felony.'

"Mr. Wharton in his work on Homicide, pp. 875, 876, states the rule and the basis thereof as follows:

"'Necessity of charging collateral felony.— At common law it was not necessary to charge in an indictment for

murder that the murder was committed in the perpetration of another crime, in order to introduce proof showing that a felony was attempted in committing it; it was sufficient to charge murder in the common form, and then, upon proof that it was committed in the perpetration of a felony, malice, deliberation, and premeditation were implied . . . .'"

This appears to us to be the position of the majority of the states, as well as being the law of our State. We find in 40 C.J.S. Homicide § 177:

"In most jurisdictions an indictment in the ordinary form for murder in the first degree is sufficient to admit proof that the crime was committed in the perpetration or attempt to perpetrate a felony, thus bringing the killing within the statutory definition of murder in the first degree."

But we are of the opinion that the evidence and the facts developed in this case will support that the killing was wilful, deliberate, malicious and premeditated. We do not believe that the State is required to rely on the [fol. 7] theory that the killing was in the perpetration of a robbery. The admission which the defendant made to the inmate in the jail was that he struck the deceased with a wrench. There is no question from the testimony of Dr. Seargeant but that many blows were struck. And then, in an effort to cover up his crime, the defendant set fire to the Queener house, as he told the trusty, by throwing the lamp down with his hands and setting the house afire. Also, the smoke house, about twenty five feet away, was burned. Then, he returned to Eastern State Hospital, in an apparent effort to escape detection of the killing. There is no question but that the blows struck were wilful and deliberate. The use of the

deadly weapon, the wrench, supplies the malice. We are of the opinion that the circumstantial evidence supports the necessary premeditation to give credence to the verdict of the jury. The design or intention to kill may be conceived, and deliberately formed in an instant. *Lewis v. State*, 40 Tenn. 127; *Galvin v. State*, 46 Tenn. 283.

We are of the opinion that the deliberation and premeditation necessary to support a conviction of murder in the first degree are supplied in the proof and facts developed in this case; and, further, that the jury had ample evidence to justify their finding that the killing was in the perpetration of a robbery, in which case the elements of deliberation and premeditation are supplied. We overrule the first three assignments of error.

It is contended that the mental condition of the defendant rendered him unable to deliberate and premeditate and incapable of committing the offense.

[fol. 8] If a defendant has the capacity and the reason to enable him to distinguish between right and wrong as to the particular act he is then doing, he is liable for his criminal acts. *McElroy v. State*, 146 Tenn. 442, 242 S.W. 883; *Davis v. State*, 161 Tenn. 23, 28 S.W.2d 993. This issue is for the jury to determine. *Long v. State*, 202 Tenn. 373, 304 S.W.2d 492.

It is true that one doctor testified that he did not think that the defendant knew right from wrong, but another doctor testified that in his opinion he did know right from wrong. We believe that there was sufficient proof to sustain the determination of the jury on this issue. The theory of the State, apparently accepted by the jury, is here, as it was on the trial, that despite the history of mental illness for a period of years, his insanity was of

the recurrent type and at this time and on this occasion he was not insane in the sense and to the extent recognized by the rule laid down by our Supreme Court and reaffirmed in *Davis v. State*, *supra*. *Drye v. State*, 181 Tenn. 637, 184 S.W.2d 10.

It is next asserted for the defense that the trial judge erred in allowing the District Attorney General, over his objection to read to the jury the defendant's history of mental difficulty and prior criminal charges as compiled by the doctors at Eastern State Hospital.

Exhibit number three, admitted into evidence with the consent of both the State and the defense, is a document containing a history of the defendant's mental record at Eastern State Hospital over the period of February, 1965 until November 22, 1968. This exhibit was introduced by Dr. Cortinas, a psychiatrist on the staff of the Hospital. The District Attorney General questioned this witness concerning his examination of the de-
[fol. 9] fendant and the contents of the report. On cross-examination counsel for the defendant requested that Dr. Cortinas read his diagnostic impression from the report. Further, he had this doctor read the psychological report made by another member of the staff, saying: "We submit, Your Honor, that is proper; it is a part of the official record of the institution." He questioned Dr. Cortinas at great length on the entire hospital record, going back to the date of his first admission, February 17, 1965. Dr. Leyla Bozgoz, a medical doctor at Eastern State Hospital was called as a witness by the defendant, and on direct examination counsel made numerous references to entries in the hospital record, exhibit three.

When the District Attorney General offered to read from the hospital report, exhibit three, counsel for the defendant objected saying: "its dealing with an altogether different time, second reason is, we have no opportunity to cross-examine the man who made the notation." Objection was also made because the report mentions that the defendant was previously admitted to the hospital to determine his competency to stand trial for burglary. The trial judge overruled the objections of the defense, recognizing that the exhibit had been introduced with the agreement or consent of both the State and the defense, and that both had quoted at length from it, or had had witnesses read from it, and he said:

"Let your Motion be overruled. And the record will show in this case that the psychiatrist who testified here yesterday, without objection on the part of either the State or the Defendant, I'm speaking of Dr. Cortinas, I understood him to repeatedly refer to this record concerning his testimony yesterday. And I understood Dr. Cortinas to say that he had reviewed the entire record of this Defendant before giving his testimony here yesterday. I understood him to say that when he first met this Defendant that his prior
[fol. 10] record was not available at that time, but that he ordered it in the course of business there in the hospital, it apparently took some time to supply these records to the different doctors, but that as soon as it was available, he did review the Defendant's entire prior record there, hospital record, and based his testimony here on that, among other things, that that was a part of what he took into consideration in reaching the opinion that he had. That he also interviewed the Defendant, and that he was giving his opinion as well as basing it in part on a review of this

record. I also understood the witness, Dr. Bozgoz to say that she had reviewed this record and had taken it into consideration in giving her opinion. I think it would only be fair to allow The State or the Defendant either for that matter, to read any portion of this exhibit which would in any way tend to corroborate or would tend to disagree with the testimony given by these witnesses. I know that they referred to Dr. Websters, Dr. Cortinas said he ordered a psychological examination of this Defendant, which was made by Dr. Webster, and he considered it in his evaluation of this Defendant. And I assume he is the same Doctor Webster who made the psychological report in October or November, 1967. So I am going to overrule your motion, and the same rule on your objection, that is it is overruled, as to the introduction of this testimony."

We think that it was proper for the jury to see the references made to this document in their proper perspective; and it was necessary for the jury to see the entire document because it recited circumstances from which the psychiatrists predicated their opinion of the defendant's mental condition. We think that it is settled law in this State that while physicians may state their opinions of the mental condition of a person, yet they must give the symptoms or circumstances from which they draw their conclusions. *Puryear v. Reece*, 46 Tenn. 21.

Under the circumstances here we do not believe that the defendant can now complain of the introduction of this part of the exhibit after having himself introduced such a large portion of the hospital report.

[fol. 11]

"An objection to the admission of evidence is waived where the same or similar evidence has been elicited or introduced by the objector, or where the evidence relates to a fact to which he himself testified." 88 C.J.S. Trial Sec. 116.

In this case the entire document which was introduced by consent was relative to the defendant's mental condition and behavior over a period of almost four years. Expert witnesses, such as physicians, are permitted to recite the history of the patient's illness in support of their evaluation of the patient's condition. This was done here, and we do not find that it prejudiced the defendant. We do not find validity in this assignment of error.

After the defendant surrendered himself voluntarily to Eastern State Hospital following this crime, one of the psychiatrists there, Dr. Cortinas, heard that he had assaulted an old man. Upon questioning the patient, the defendant, Dr. Cortinas testified that he admitted the crime. Dr. Cortinas said that he asked the defendant why he committed the crime and he told him that he did not know; that the deceased was arguing with him. The testimony of Dr. Cortinas was objected to on the ground that the defendant was not advised of his rights before making the admission; and it was contended that Dr. Cortinas was an agent of the State, and that the defendant was in custody. The trial judge allowed the testimony and this is assigned as error.

Dr. Cortinas testified that he talked to the defendant about the assault upon Mr. Queener only as a necessary part of his examination to determine his mental [fol. 12] condition and not with any intent or thought that his statements might be used against him. In

any event his testimony is cumulative insofar as the confession is concerned.

Section 24-112 of the Tennessee Code Annotated provides that communications between a patient and psychiatrist shall be privileged except in civil and criminal cases where the mental condition of the patient is an issue or where it is determined by the court that the interests of justice require that the privilege be withheld.

In the instant case the defendant was not charged with any offense at the time he confessed to Dr. Cortinas. He had entered the hospital voluntarily. He was not admitted for the purpose of determining his mental capacity to stand trial for a crime. We are of the opinion that the interests of justice require that the privilege be withheld.

We do not believe that the admission of Dr. Cortinas' testimony violates the ruling in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 882. No prejudicial error was committed in this regard.

At the time that the defendant returned voluntarily to Eastern State Hospital, on October 29, 1968, he changed clothes and put his clothes in his locker. An orderly at the hospital took charge of the defendant's clothes as well as his billfold. In the billfold there was a newspaper clipping, which was introduced into evidence without any objection being made to it. The clipping was a news item entitled: "MAN BEATEN, LEFT IN BURNING HOUSE." Then, when Sheriff Rose Kitts testified about transporting the defendant from the hospital to the jail he stated that the defendant admitted that he had assaulted [fol. 13] Mr. Queener with a monkey wrench and set the house on fire. Afterwards counsel for the defendant posed an objection to the introduction of the news-

paper clipping and an objection to the testimony of Sheriff Kitts concerning their admission. The trial judge sustained both objections, after hearing proof out of the presence of the jury, and he instructed the jury that the evidence was stricken from the record and they could not consider it. We do not believe that the trial judge was in error, especially since no objection was made when the evidence was presented. Just as soon as an objection was made he acted properly, held a hearing in the absence of the jury, and then sustained the objection.

An assignment of error based on the admission of evidence will not be considered unless timely objection and exception was made in the trial court, and the trial court given an opportunity to make correction. *Anderson v. State*, 207 Tenn. 486, 341 S.W.2d 385; *Nichols v. State*, 200 Tenn. 65, 289 S.W.2d 849.

Our Supreme Court, in *Marable v. State*, 203 Tenn. 440, 313 S.W.2d 451, said:

> "This Court long ago in a case cited both by the plaintiff in error and the State, of *Stokes v. State*, 64 Tenn. 619, held that we, the Supreme Court, would not reverse because of admission of incompetent evidence which was afterwards withdrawn, unless we are satisfied that the jury was in fact influenced by this incompetent evidence. We are not so impressed under this record."

We find that the withdrawal of the evidence from the jury, when it was first objected to by the defense, removed the matter from the category of prejudicial error, if indeed it was error. The evidence was cumulative. We overrule the assignment of error.

[fol. 14]

In our study and review of this record we find no error which would require that the judgment of the trial court be reversed. We are of the opinion that the judgment should be sustained.

We express our appreciation to counsel appointed in this case for effectively representing the defendant.

The judgment is affirmed.

/s/ Oris D. Hyder
Oris D. Hyder, Judge

Concur:

/s/ Robert K. Dwyer
Robert K. Dwyer, Judge

/s/ Mark A. Walker
Mark A. Walker, Presiding Judge

APPENDIX F

SUPREME COURT OF TENNESSEE, AT KNOXVILLE
SEPTEMBER TERM 1969

[fol. 1]

Filed Apr. 20, 1970
John A. Parker, Clerk

Clarence Phillips
Vs.
State of Tennessee

Campbell County Criminal

WRIT DENIED

This case coming on to be heard upon a transcript of the record from the Criminal Court of Campbell County, opinion and decree of the Court of Appeals, petition for certiorari, assignments of error and briefs of counsel, upon consideration whereof the Court is of opinion that the petition for writ of certiorari is not well taken, and said petition is denied.

The petitioner Clarence Phillips will pay the costs incident to filing petition for certiorari, for which let execution issue.